United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1069 76-1077

To be argued by
GRETCHEN WHITE OBERMAN

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

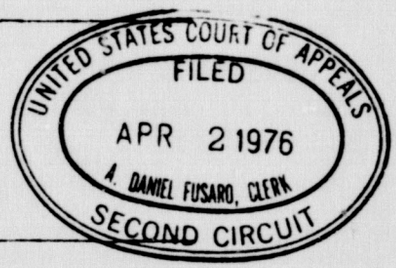
JOHN DININO, ET AL,

Defendant-Appellant.

IND. NO.
76 cr. 1077

On appeal from a judgment of the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT
JOHN DININO



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UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLANT JOHN DININO

QUESTION PRESENTED

1. Whether the trial court erred in submitting the case to the jury.

2. Whether the government summation, objected to below was improper because predicated on facts not in evidence and whether the error can be disregarded as harmless in the circumstances of this case.

3. Whether the trial court's charge on threats and fear, objected to below, was erroneous and whether the error can be disregarded as harmless in the circumstances of this case. Whether the court's charge on conspiracy was plain error affecting substantial rights of the appellant.

4. Whether the conviction must be reversed on due process grounds or in the exercise of this Court's surpervisory power because grand jury testimony used as substantive evidence was obtained in violation of the prosecutor's obligation to observe essential fairness in his presentation to that body.

5. Whether the statute is unconstitutional if the evidence is legally sufficient to support a verdict.

STATEMENT PURSUANT TO RULE 28(a)(3)

(a) Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Griesa, D.J.) convicting the appellant John Dinino, after jury trial, of four substantial counts of unlawfully participating in the use of extortionate means to collect extensions of credit and one count of conspiring to do. (18 U.S.C.Sect.894) The appellant was sentenced to a concurrent one year terms of imprisonment on counts 1, 2, 4 & 5, and a two year consecutive term of probation on count 7. He is on bail pending appeal.

(b) Statement of Facts

The indictment contained one conspiracy count (count 1) and six substantive counts (Counts 2 - 7), all under 18 U.S.C. Section 894. The trial court dismissed count 3 and the jury acquitted on count 6.

The government's seven witnesses were all owner - drivers for two private car services in the Bronx. All knew and borrowed money from Dinino and the co-defendant over a four to five year period, seeing them perhaps three times a week. All knew other drivers who also borrowed from Dinino and the co-defendant and had been present when other collections occurred. The only proof of guilt the government offered was six incidents occurring between 1968 and 1973, the period when the conspiracy to extort allegedly existed.

Philip Jackson began borrowing from Dinino in late 1970. (A.19) * He knew Dinino was the local loan shark and as he frequently seen him collecting and giving money to other drivers. (A.24) During the years he dealt with Dinino, he saw him between 50 and 100 times. (A.90) In 1971 alone, Jackson saw Dinino at least three times a week. (A.35) No physical harm ever be fell him during the entire period.

Jackson had asked another driver to "please ask (Dinino) if he would lend me money. " (A.34) When they met, Dinino told him he gave two kinds of loans -- a "vig" loan with a $5. a week interest payment on every $100. borrowed as long as the principle was outstanding, and a " 6 for 5" loan with a $120. repayment for each $100., in 6 weekly payments of $20. each. (A.25)

Jackson wanted $500. but Dinino said his office policy was to lend only $200. to a new customer. (A.25) Dinino lent him $200. and Jackson paid $10. a week interest for a few months and increased the loan to $500. (A.28-29)

In the spring of 1971, Jackson asked for a $500. "6 for 5" loan, but Dinino only agreed to lend $200. (A.30-31) During the next year Jackson renogiated this loan about 12 times, by paying part of it and then borrowing the difference between the unpaid balance and $200. (A.34) During this period, Dinino introduced him to DeVito, the co-defendant, saying DeVito was his partner. (A.37)

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* All references are to appellant's appendix.

After that the two men took turns coming to the cab company to collect. (A.37)

Jackson described Dinino's collection practices with other drivers, which he frequently witnessed:

> "A Mr. Dinino would come in...to collect money, and he would go over to individuals...and ask them for their payments... when they weren't there, he either would leave word that I'll tell so and so and I'll be back on Wednesday, or, tell him to leave his money, or on occasion when they were there and they didn't pay on their particular day he would tell them that they had better have their money the next time, or, I'd see you next time. If they didn't pay on the second trip, he got a little more aggressive with them or --
>
> ***
>
> THE COURT: ... What was said ?...
>
> THE WITNESS: Well, I heard on occasion him tell somebody who was behind a week that I'll be back next week, I don't want to hear any more bull shit, I don't (sic) want your payment and I don't want to hear any more stories. " (A.38)

In the fall of 1971, Jackson began to book bets with Dinino for cash, not on credit. (A.39-40,43) Jackson also asked for another loan but Dinino refused, as Jackson had reached his limit. (A.44) Jackson then got Ronald Levine to take out a $500. loan which Dinino did not know was actually for Jackson. (A.45)

In January, 1972, Jackson lost $1,800. gambling and asked Dinino to wait two weeks for payment of the debt. (A.46-47) Dinino agreed. (A.47) Two weeks later, Jackson again sked for more time to pay. (A.48) According to Jackson, Dinino

"...wasn't satisfied with that. He told me that it wasn't for (sic) his money and he was working for an office and he wasn't responsible and he didn't want to hear any more stories and he wanted his money and expected me to have it on Friday when he returned for his normal payments from me on my other loans." (A.49)

When Dinino returned a few days later, Jackson told him he could not pay the $1,800. (A.53) Jackson proposed that he pay Dinino $25. a week to cover the $1,800. as well as his two outstanding loans. (A.53-54) Dinino said he was crazy; it would take years to pay that way. He told Jackson he "didn't even want to discuss it and I had better come up with a better figure, more like $100. a week. " (A.54)

Two days later, Jackson spoke to Dinino and again said he could not pay the $1,800. and continue to meet his loan payments. He also told Dinino the Levine loan was his and when they made a package settlement, that the Levine loan had to be included. (A.56) Dinino " got very angry " and said he would not allow Jackson to consolidate the Levine loan with his. (A.56) Dinino left Jackson to talk to Levine. (A.57) Jackson did not overhear that conversation. (A.57-58) Then Levine came over, spoke to Jackson, and Jackson and Dinino had the confrontation which was the basis of count 4 of the indictment:

" Q What did you say to Mr. Dinino?

A Well...I am telling him again that no matter what he says or does, what I had told him is going to be what's going to happen. Again, that Ronnie Levine's loan was part of my loan and that I was responsible for it and...

that Mr. Dinino would have to accept my terms, and if he didn't accept my terms I wouldn't give him anything.

Q What did Mr. Dinino say?

A He told me he didn't even want to talk with me about it, he didn't want to hear any more, and I told him if he wants to hear it or not that's the way it's going to be, and I told him if he doesn't like it I won't pay him, and he told me, for two cents I'll bust your balls right here.

Q What did you then do?

A I told him, go ahead, if that's what you're going to do. And we argued back and forth for a minute or two and nothing came of it, and he drove off and I went back inside. " (A.58-59)

A week later Jackson and Dinino agreed on Jackson paying $100. a week for a year to clear Jackson's $1,800. gambling debt, his own two loans and the Levine loan. (A.59-60)

" Q What, if anything, did Mr. Dinino do that made you agree to pay $100. to him rather than the $25. that you originally proposed?

A Well, besides threatening to bust my balls on Friday the fact that I had owed him money through the borrowing of the loans and the fact that I had owed him money through the bookmaking operation, and he explained to me that they were two different offices, I was doubly frightened because I was afraid that either one of his offices that he had worked out of might come down and threaten me or do any damage, bodily damage to me. " (A.60-61)

On cross, Jackson testified that the expression "bust your balls" was a man's colloquial expression; he had

heard it in the Army, and had used it himself. (A.95) Jackson was not permitted to state whether the expression meant that a physical part of the body was busted. (A.92-93)

Despite his professed fear, Jackson only made the $100. payment for three or four months. (A.61-66) He then told Dinino he could no longer pay that amount that he would only pay $10. a week to clear the loans. (A.62)

" Q What did Mr. Dinino say to that?

A He accepted it. " (A.62)

While Jackson was making the $10. payments, the co-defendant DeVito told him a man named Louis would collect for the next few weeks instead of DeVito. (A.64) He did not see Dinino during this period. (A.89) He saw Louis 9 or 10 times. (A.65) One day when Louis came, Jackson asked him why he was there and Louis told him he

> " had been looking to collect from Sid Shalkin for...a week and could never get him in, and he was making it his business that he would get him in today... and I asked him why he had to act so rough and tough, and this wasn't the roaring twenties, and why did he have to walk around as if he was a real tough guy, and that if Sid Shalkin didn't pay him the money why, he didn't have to imply or say that he would do anything to him. And at that time he walked up to me and took a revolver out of his pants and put it right to my chest and said, for two cents I'll blow your fucken brains out. (A.66-67)

Jackson testified that he was " very frightened. " He subsequently saw Louis speak to Shalkin. * (A.67)

The trial court, at side-bar, expressed grave doubts about the sufficiency of this evidence:

> " ...Jackson...testifies that Dinino says, "I don't want to hear any more stories. I got to get paid, "but then he composes (sic) the debt, the total debt, for $100. a week payment, and then upon objection by Jackson, he agrees to accept $10. a week -- where is the extortion?
>
> ...Jackson could come in and testify till the cows come home that he was afraid, but Jackson was a pretty muscley guy on the stand. The upshot of it all is that Dinino caved in and was letting him pay off $10. a week.
>
> ***
>
> Extortion is a serious crime, and you have to have a case...I do not think you have a case...I do not think you have a case on Jackson. To convict a guy for extortion you have to prove beyond a reasonable doubt something besides the kind of give and take among grown, rather rough men in circumstances in which they found themselves.
>
> This was not the lobby of Morgan Guarantee. It was not intended to be. There may have been a crime...in this kind of conduct, but ...not under the law I am worried about. There may be a problem under State law. Maybe the State...does not permit people to loan under these terms and circumstances. ...But I am dealing with an extortion statute..."

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* Compare Shalkin's testimony <u>infra</u>, P. 10 .

Sidney Shalkin met Dinino in 1973, and borrowed $200., agreeing to repay $25. a week for 12 weeks. (A.122) He made 6 or 7 payments and became ill. (A.122) He did not make payments or go to the taxi yard for two months. (A.123) When he returned to work he told Dinino the circumstances and "there was a remark made that I might get a punch in the nose. " (A.124)

Shalkin resumed payments and also got renewals of the loan two or three times. (A.124) When asked if he ever made payments to anyone else, Shalkin said he may once have made a payment to DeVito. (A.125) Shalkin stated he owed Dinino money for a year or so and made payments " on and off" during that time. (A.126)

On cross, Shalkin admitted he had heard the expression "if you don't do thus and so, I'll punch you in the nose; that no one ever punched him in the nose when they said it; that it could be just a figure of speech; that no one punched him in the nose when he took longer to pay the money and that Dinino never hurt him. (A.134-135)

At side bar, the trial court commented that under the statute, if one took the language that someone would punch you in the nose, " that literally is a threat, but from my point of view, I think it would be a travesty and am sure it would not stand up for two seconds on appeal." (A.277)

Ronald Levine borrowed $500. from Dinino for Jackson. (A.249-50) Levine was present when Dinino and Jackson had the argument about that loan, and testified " they were hollering about who was to pay it. " (A.253) Levine stated that Dinino " told Phil to stop yelling and he told him he would kick him the balls (sic)if he didn't stop. " (A.253) Levine had no emotion during this argument except that he felt uneasy. (A.254)

Levine also borrowed $300. from the co-defendant DeVito. In response to a question, " Did Mr. DeVito tell you what would happen if you missed a payment in 1972? " (A.254-55) Levine stated DeVito was " a perfect gentlemen." (A.254-55) After the DeVito loans were paid, Levine took out another loan from Dinino and went to Dinino for car repairs. (A.266-67)

During Levine's direct testimony, the special assistant twice read into the record parts of Levine's grand jury testimony. The two grand jury statements, which Levine would not confirm at trial, were first, that after the Jackson - Dinino argument, Levine felt frightened and Jackson looked angry and scared (A.280-283); and second, that when Levine could not repay a bet place with Dinino, Dinino said " he was going to send around a few guys to straighten me out. " (A.290)

Levine stated the minutes only refreshed his recollection on what he said in the grand jury room, but did not refresh his recollection as to what Dinino actually said to him in the fall of 1972,

> "because I had told you in your office that I don't think John said it. I was under a lot of pressure at the time. " (A.289)

Levine also testified that "I told you many, many times, I was never afraid of John Dinino. " (A.290) Levine stated he remembered testifying to fear in the grand jury,

> " Under pressure from the federal attorney, I remeber giving the testimony. " (A.291)

On cross, Levine amplified his testimony about his grand jury testimony being a product of prosecutorial pressure.

He testified that Dinino never threatened him, that they used to play cards together and " always got along great until this thing happened..." (A.294) They played cards together three times a week, and Levine "used to eat with (Dinino) just about every time he came around. " (A.295) The first time he was questioned, he lied to the FBI by saying he didn't know Dinino,

> "Because I happened to have liked John and Vinny, and I didn't want to be involved in anything like this because there was no--as far

as I was concerned, there was no grounds for anything.

I had no reason for getting people sent up for nothing at all, as far as I was concerned. " (A.298)

Levine then described his interview with the special attorneys:

" I went in to see the federal attorney, it wasn't Mr. Abzug, it was Mr. Padgett, and I went in as an unstable person. I was terrified, lets put it that way, and I went in and Mr.Padgett went and said to me.

He said, Loo, (sic) there is two types of witnesses. There is a witness that sort of like plays our type of game and goes along with what we say and then there is a witness that is a hostile witness. You have your choice. You can either be one of our witnesses or you can be a hostile witness. " (A.299)

Levine said he " didn't want to get into any trouble. " (A.299) So he repeted things Dinino said,

" ...which to me meant absolutely nothing. In other words, that's how we talked to each other... there was nothing meant by anything that me and John would say. " (A.300)

Levine testified that if someone at the cab company said, "I'm going to kick you in the balls", what it meant depended on who said it. (A. 300-301)

" Q... If John said to you, " I am going to kick you in the balls, what would that mean to you ?

***

A... Well, like I said, John is John. You have to understand John. That's the best way I can put it.

Q... Would you be in fear when he said that ?

A... No.

Levine also testified that the co-defendant DeVito was not a violent man. (A.302) When asked what his state of mind was concerning his transactions with Dinino and DeVito, Levine stated he did not feel they were extorting or using force in order to get money from him. (A.302)

Samuel Hershkowitz first met Dinino in 1965, when he borrowed $100. (A.223-25) Between 1965 and 1969, he borrowed another $200. (A.226) In 1969, he borrowed $500. and renogiated the loan twice. (A.227-28) When he told Dinino he could not make the $60. weekly payments and would make interest payments , Dininc said, " fine, it will cost you $10. a week. " (A.229)

Hershkowitz paid the interest until 1970, when he got sick. (A.229) He was unable to work for three months and during this time, didn't give Dinino anything. (A.231)

After about two months he went to the cab company to visit and Dinino came in.

" And he grabbed me by the arm in an angry tone of voice and he said to me, 'Where is the money you owe me...I said, haven't I paid you enough ? He said, 'No, you still owe me money and you have to pay me.

I said, ' I can't do anything right now because I'm sick and I have to wait until I go back to work.

He finally calmed down and agreed to it. " (A.231)

After about a month, Hershkowitz went back to work and paid the five remaining $60. payments, and " that was the end of it. " (A.231-32)

On cross, Hershkowitz testified his relationship with Dinino was "very friendly". (A.234) He never saw Dinino hurt anyone and Dinino never hurt him physically. (A.234) On certain Fridays, Dinino used to take them out for coffee. (A.235) When asked, "you are not afraid of him, are you ?" Hershkowitz answered:

A... "Not at that time. Now I am, because I have been sick for the last...I'm on Social Security Disability and that means a lot.

****

The Court:...Why would that make you afraid of Mr. Dinino?

A... I'm not as strong as I used to be." (A.236)

Hershkowitz testified that during the period Dinino loaned him money, he was not afraid of Dinino. (A.236-37)

On redirect, over objection, Hershkowitz testified that his recollection was refreshed by grand jury testimony that in addition to being angry at Dinino, he was also afraid because he was sick. (A.242-43) He further stated that Dinino did not hurt him when he grabbed his arm.

Philip Cassese suffered a mental breakdown in 1973, causing memory difficulties. He was temporarily excused until the court decided how his grand jury testimony would be treated. (A.203-221)

The court subsequently ruled, over objection, that his grand jury testimony was admissible not only to impeach, but as substantive evidence. (A.268-69) The court felt that some of Cassese's claim of lack of memory was "somewhat unconvincing." (A.269) After Cassese was excused, Hershkowitz had testified he was afraid in the courtroom (supro, P.15) "... and Mr. Cassese, his condition indicated to me some of the same feeling." (A.270) The court then admonished all present against attempting to intimidate witnesses. (A.270-71)

When Cassese was recalled, he continued to attribute his lack of memory to his psychiatric condition. (A.318) He also stated the government representative was a liar because he promised Cassese and his wife "that they wouldn't

bother me to any great extent because of the fact I was and still am under the treatment of a doctor. " (A.319) He felt the government was dishonorable because he was promised he wouldn't be brought into court "because of the fact that I was being treated for a depressed condition of mine (sic). " (A.320) He did state that despite this, he was meeting his obligation to till the truth, and he again gratutiously volunteered that the government representative was a liar. (A.320-22)

The whole of Cassese's grand jury testimony was ultimately read to the jury over defense objection. (A.362;366-378)

In the grand jury, Cassese recalled telling Padgett at an earlier interview that he obtained loans from Dinino ranging from $50. to $150. (A.368) Whatever he borrowed " and whatever I agreed to pay, was strictly on my own free volition...whatever the agreement was between me and ...John, was not forced on me. " (A.369) If he missed a payment, he paid a "vig" payment that did not reduce the loan. (A.370-71)

Cassese testified in the grand jury he did not know if Dinino and the co-defendant DeVito were partners; that they knew each other but he never saw them together. (A.372) Cassese testified in the grand jury that once when DeVito came for a payment, there was a misunderstanding over what

Cassese owed and DeVito slapped him. (A.373) He thought he would have repaid the loan even if DeVito had not slapped him. (A.374)

Cassese testified in the grand jury he was aware that Dinino was a loan shark. (A.375) He was asked:

> Q... But it was your understanding at the time that you were borrowing money from Mr. Dinino that he was a loanshark and that loansharks commonly collect unpaid debts by threats?
>
> "A... By force?
>
> "Q... By threats and force.
>
> "A... Well, if that was so, I wouldn't borrow from these people. "
>
> "Q... Is that your understanding or not?
>
> "A... That is right. I wouldn't borrow from these people if I felt they would use force to collect. " (A.375-76)

Cassese also told the grand jury he had heard of loansharks collecting by force and threats of force, but he never knew of it happening in real life. (A.376) He was then asked:

> "Q... What I want to ask you is whether the slapping incident that you testified to before this grand jury changed your opinion of loansharks.
>
> "A... No, it didn't.
>
> "Q... It did not?
>
> "A... No. The slapping was a misunderstanding. I might have said something to infuriate this particular person, sort of a personal offensive remark.
>
> "Q... Well, you didn't-- did that in fact occur?

"A... I did, yes. I personally offended him."
(A.377)

Cassese also testified before the grand jury that neither he nor any member of his family were ever threatened by Dinino or DeVito in an effort to get him to repay any of the loans. (A.378)

Cassese's testimony from the witness stand reaffirmed his grand jury testimony. He stated DeVito slapped him because he was "very offensive to him personally. " (A.327)* He told DeVito he was paid up on the loan and where DeVito disagreed:

> "... I lost my temper and I sort of moved towards him and he slapped me in the face and sent me back. " (A.328)

The payment at issue was for $15. (A.331) He would have paid the money without the slap " because it was my obligation -- " (A.334)

On cross examination, Cassese testified he considered Dinino a friend and benefactor. He never made any payments to Dinino because he was in fear of Dinino:

> " No fear, Never. We played cards together, we drank together, we ate together. He was at my house for coffee (A.333)

Cassese also testified that when he was interviewed by the FBI and by the special assistants before testifying in the

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* Charles Penker testified that before Devito slapped Cassese, Cassese had called DeVito a cheater. (A.162)

grand jury, he made it known to them that at no time had he felt he was the victim of extortion by Dinino or DeVito and that these statements were truthful. (A.350-51) He also told the FBI and the assistants before he testified in the grand jury that he was never threatened to make him repay the loans, and that he never felt coerced or threatened. (A.355) The court refused to let Cassese answer the questions:

> "Q. When you testified before the grand jury, were you able to make known to the grand jury the entire truth concerning your transactions with Mr. Dinino and Mr. DeVito? (A.353)
>
> and:
>
> "Q. Did the U.S. attorney who questioned you before the grand jury ask you questions concerning all of the information you had told him about your transactions with Mr. Dinino and Mr. DeVito? (A.353)

The court told the jury it was not "trying the validity of the grand jury's action " or " whether there was a complete flushing out of everything." (A.354)

The remaining testimony involved counts 3 and 6, where no conviction resulted.

Norman Ronson had numerous loans from Dinino from 1969-1971. (A.388) He never saw Dinino threaten anyone and never heard from the group at the cab company--which was close knit and friendly--that he had threatened anyone else. (A.409) Once, he heard Dinino say to another cabbie, "cut out the bullshit. " (A.391) When he could no longer make his scheduled payments, he asked Dinino for relief and

got it. (A.410) No threats were made. (A.410)

The government did prove that when Ronson had missed a payment, Dinino called Ronson's home and spoke to his wife. (A.395-399) It stipulated, however, that no threat was made to the wife. (A.394)

The government's theory was that Ronson was "extremely embarrassed and upset because he didn't want his wife to know he was borrowing from loansharks. " (A.394) He pleaded with Dinino not to call his house and Dinino said, " I'will keep calling your house until you agree not to miss any payments, ' which is definitely a threat to the man's reputation, your Honor. That's how I would characterize it. " (A.394-95)

The court ultimately dismissed the count involving Ronson. (A.507-11)

Charles Penker borrowed from Dinino from 1971-1973. He was present when DeVito slapped Cassese after Cassese accused DeVito of cheating him. (A.162) In January of 1973, Penker and Dinino had a dispute over whether Penker still owed $100. or $300. (A.77) According to Penker, Dinino said to him:

> "I want all my money in. ' He said, ' I'm getting out,' and he said, 'Don't get me pissed off,' and he was a changed person. " (A.177)

The jury acquitted on the Penker count.

After the government rested, Rule 29 motions were denied, the court finding that there was enough to go to the jury on the issue of express or implied threats of the use of violence on every substantive count except count (A.421-22) The court also rejected a constitutional challenge to the statute. (A.431)

Dinino called no witnesses. The co-defendant DeVito called two character witnesses who testified without impeachment, to his good reputation for peacefulness, non-violence. (original record, T.433-42)

In summation, the special assistant explained the adverse testimony he had gotten from his own witnesses as a product of fear of the defendants. He first stated:

> " It is not necessary that the witnesses testified they were afraid, because some of the witnesses testified they weren't afraid in the case. And I think you know why. " (A.451)

Counsel objected and moved for a mistrial. (A.451) The court denied the motions, stating that the prosecutor had not said anything improper. It also asked counsel not to interrupt the summation with objections. (A.451)

The prosecutor then argued that the defense had no basis to contend that the government was harassing its own witnesses; "we are not harassing them. They are harassing

them. That is what the trial is about." (A.456) He stated that it was unfortunate no record was made of what the defendants said and did to the government witnesses, for

> " all we have is some of the admissions they were willing to make in the grand jury and some of the testimony they were willing to make on the stand. " (A.456-57) (emphasis added)

To explain Cassese's adverse testimony, the assistant stated, "He is afraid. He is afraid to testify before you." (A.472) He had also told the jury they had a right to consider the witnesses' "aspect" when they were testifying. (A.455) *

After the summation, the defense again moved for a mistrial, stating that the prosecutor's argument imputing to the defendants the witnesses' refusals to testify favorably for the government was without support in the evidence.** (A.508) The trial court again held this fair comment because

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* Did they look like they enjoyed being here, these men? Did Ronald (Levine) look white as a sheet, did he look like he enjoyed being here,? or did Sherman Ronson, you couldn't hear the guy he was so scared, did he enjoy being here? No, they didn't enjoy it." (A.455)

**In addition to the absence of proof of fear at trial, it is significant that both defendants were at liberty on personal recognizance bonds since arraignment in April, 1975, and that at no time before or during trial did the government move for their remand or to increase bail because of threats to witnesses or even because any witness had expressed a feeling of fear or harassment. (Cont. on pg. 24)

one witness, Hershkowitz testified to fear on the stand, and because,

> "...the essence of what the government was arguing was that there was a reason that that these witnesses may not have or did not tell the full truth, because they were afraid, and there was circumstantial evidence of that or direct evidence of that on the stand." (A.508)

In charging the jury, the court stated that in assessing a witness' testimony, the jury was to consider whether he had any fear of the defendants and that they were entitled to consider whether "certain of (a witness's testimony) was influenced in such a way as not to be credited. " (A.521-22)

He also instructed that the jury was to consider whether the testimony of certain debtor witnesses denying that they were threatened was influenced by fear of the defendants. (A.530) The court further instructed that the testimony of a witness that he was not threatened, even if believed by the jury, was not conclusive or binding upon them; that a threat is normally something inducing fear; that the credibility of the witnesses' denials of fear was for the jury; and that in any event, the government did not

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** contin. from pg.23
Dinino's attorney also stated he had specifically questioned him and his family on whether any of them had ever spoken to any witness, "and I just wanted the record to show there were absolute denials. " (A.511)

have to prove that fear was actually induced. (A.530-531)

Exceptions were taken to the court's charge on fear of the defendants by the witnesses (A.555); and to the charge that the jury could disregard a witness's testimony that he wasn't threatened as well as his denials of fear. (A.557)

During deliberation, the jury called for the part of Levine's grand jury testimony admitted as substantive evidence. (A.564) The court refused defense counsel's request to include Levine's simultaneous direct testimony that his grand jury testimony was pressured by the government. (A.567-68) Defense motion for a mistrial was denied. (A.569-70)

After a day's deliberation, a verdict of guilty was returned on five counts.

POINT I

THE TRIAL COURT ERRED IN SUBMITTING THE CASE TO THE JURY.

The government established that for a five year period, appellant had lent money to a group of cabbies at usurious interest rates, and that appellant and the co-defendant DeVito took turns making weekly collections. During this five year time span, where, according to the government's own witness's, appellant was seen collecting on hundreds of occasions, the government proved one altercation where appellant told a debtor he would bust his balls, was told to go ahead and try, and backed off (Jackson); one instance where a witness testified in the grand jury to a threat, and disavowed the testimony at trial on the ground the government pressured him into giving testimony of an event that never occurred (Levine); one instance where appellant remarked to a witness that he " might get a punch in the nose ", which he never got (Shalkin); and one instance--not charged as a substantive count--where appellant grabbed a debtor's arm, asked for his money in an angry voice, was told he would have to wait for it, and agreed to do so. (Hershkowitz)

The government also established that on one occasion when appellant was not present, the co-defendant slapped a debtor who was personally offensive to him, and that the

debtor would have paid what he owed despite the slap, because it was his obligation (Cassese); and that on another occasion where appellant was not present, the co-defendant authorized a man named Louis to collect, and that Louis--again when appellant was not present--pulled a gun on a 200 pound driver (A.359) who told him to stop acting like a tough guy out of a roaring twenties movie. (Jackson)

The government also established, through the testimony of its own witnesses at trial, that during the five year period the collections occurred, Levine and Cassese considered appellant a friend and benefactor, socialized with him, and never felt that appellant or the co-defendant were extorting or using force to get money from them; that Ronson never saw appellant threaten anyone and had never heard from the close knit group of cabbies, that this had happened; and that the most aggressive appellant had ever gotten with a debtor who couldn't pay was to tell him to cut out the bullshit. (Ronson and Jackson) Cassese gave positive reputation evidence for appellant in his grand jury testimony, admitted as substantive evidence.

The government never came forward with evidence that

the witnesses' testimony, favorable to the defendant was improperly motivated and hence could be disbelieved; or with affirmative evidence of threats and fear. * Compare U.S. v DeLutro, 435 F.2d 255 (2Cir. 1970) Only one witness Hershkowitz testified on cross that he was in fear of the appellant at the trial, though not when he was a debtor, because he was on Social Security Disability and was not as strong as he used to be. However no other witness ever stated he was in fear of the appellant while on the stand; no extrinsic evidence of threats and fear was offered as the government was entitled to do under DeLutro, supra ; and Levine specifically disclaimed any feelings of animosity between himself and the defendants.

This case should never have gone to the jury.

First, not only was there no evidence under Sect.894(b) to show that any debtor was aware that appellant collected or attempted to collect other extensions of credit by extortionate means--ie by implicit or explicit threats of force or actual use of force (Sect.891 (7))-- there was affirmative evidence that to the knowledge of all debtors, appellant had never used such means to collect other debts.

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* However the government argued in summation over objection, that the witnesses' unfavorable testimony was attributible to fear of the defendants (See Point II) and the trial court instructed on such fear, also over objection (See Point III)

Second, not only was there no evidence under Sect.894 (c) of appellant's bad reputation for using extortionate means to collect in the witnesses' community, but there was affirmative evidence of appellant's good reputation in this regard from Cassese, Ronson and Jackson.

The conviction can only stand if the statements by appellant to Jackson and Shalkin, and the grabbing of Hershkowitz's arm are sufficient, in and of themselves, to establish use of "extortionate means " to collect debts within the purview of Sections 891 (7) & 894; if a conviction can be predicated solely on prior grand jury testimony; if sufficient proof of the conspiracy count was elicited; if the actions of the co-defendant DeVito and the unknown Louis are attributable to appellant in the absence of a Pinkerton charge (328 U.S. 640 (1946) or one on aiding and abetting; and if the conviction was predicated upon the proof presented by the party bearing the burden of proof, and not by substituting for such affirmative proof a disbelief in the witnesses' testimony and a conclusion that the truth was the opposite of what the Government witnesses' had testified. * Dyer v McDougall, 201 F.2d 265, 269 (2Cir.,1954)

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*The government asked the jury to draw such a conclusion in its summation and the courts instructions permitted--if not actually encouraged--such a result. See Points II & III, infra.

Since all these questions must be answered in the negative, the trial court erred in refusing to dismiss after the close of the prosecution's case.

(a) The appellant's conduct did not meet the objective standard of U.S. v Natale, 526 F.2d 1160 (2Cir.,1975)

In U.S. v Natale, supra, the Court held that the evil attached by Sec. 891 (7) was the defendant's conduct, not merely the victim's subjective state of mind. * Natale adopted Judge Timber's construction of the statute in U.S. v Curcio, 310 F.Supp. 351, 356-57 (D.Conn.1970) that a defendant's conduct is criminal provided the defendant calculatedly and intentionally took action which would reasonably induce fear in an ordinary person. (526 F.2d at 1168)

Under this objective standard, the Jackson, Shalkin & Hershkowitz incidents should not have gone to the jury.

The trial court's initial analysis of the Jackson incident was correct. Jackson gave appellant an ultimtum which triggered the argument--accept my terms or you don't get paid. As the trial court stated, the upshot was that appellant "caved in"-- "where is the extortion? " (supra,p.9)

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* This construction avoids the problem raised but not resolved in U.S. v DeStafano, 429 F.2d 344,347 (2Cir.,1970) of whether the statute reaches innocuous conduct if a debtor believes a threat is being made.

Moreover, Jackson himself testified that when appellant said " for two cents I'll bust your balls right here " Jackson dared him to carry out the threat and "nothing came of it. " (supra, p. 6) Levine, who witnessed the incident, testified that the "bust your balls" threat was made to stop Jackson from yelling, and never stated that it was made in the context of coercing payment of Jackson's debt. Jackson acknowledged on cross that the vulgarism was a man's colloquial expression which he had heard and used himself. * Whatever sinister implication Jackson read into Dinino's statements that he had two offices was merely his subjective interpretation of innocuous conduct. U.S. v DeStafano, supra . Applying the test of U.S. v Taylor, 464 F.2d 240 (2Cir.,1972), no reasonable mind could have concluded beyond a reasonable doubt that appellant engaged in the use of extortionate means to collect the Jackson debts.

Shalkin testified that the "punch in the nose" expression was a figure of speech he had heard before; that it did not connote physical action; and that no one ever punched his nose when he was unable to make timely payments. Since Sect. 891 (7) requires a threat of use of violence to cause one harm, and since Shalkin acknowledged that the language did not convey a threat to use violence to harm him, it would,

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* There is a vast difference between being known as a ball-buster and a leg-breaker.

as the trial court acknowledged, be a "travesty" to construe the literal language to constitute a crime under the statute, and to send that count to the jury.

With Hershkowitz, as with Jackson, appellant expressed anger that Hershkowitz was unable to pay him, but "finally calmed down and agreed to it." (supra, p. 15) Appellant had grabbed his arm but did not hurt him. The upshot was that Hershkowitz, like Jackson, got what he wanted-- in his case, a three month period where no payments were made to appellant.

As with Jackson, where was the extortion ?

No matter if the jury believed Hershkowitz's trial testimony that the incident made him angry or his grand jury statement that it also made him afraid, a reasonable mind could not find beyond reasonable doubt, that the conduct of appellant, judged by objective standards, constituted calculated and intentional action reasonably inducing fear in an ordinary person.

(b) The conviction on count 2 was improperly predicated solely on prior grand jury testimony.

Levine testified that before his grand jury appearance he never believed there was a ground for the extortion charges against appellant and that he never felt appellant and the co-defendant had extorted or used force to collect money from him. He denied that appellant threatened to send guys to straighten him out and that he had been afraid of appellant, testifying he also told the special assistant he did not think

appellant said this and had so testified in the grand jury only under pressure from the federal attorney. He stated categorically at trial that appellant never threatened him or put him in fear.

The only evidence that threats were made to Levine was his disavowed grand jury testimony, which the jurors specifically called for during deliberation.

Leaving aside the questions raised in other points concerning this testimony, the question remains whether the prior out of court testimony given without cross-examination and without an opportunity to appraise demeanor can suffice as the sole basis for conviction on count 2, since due process requires a minimal standard of evidentiary support to sustain a conviction. Vachon v New Hampshire, 414 U.S. 478 (1974) and cases cited at 480; c.f. California v Green, 399 U.S. 149, 163-64, n. 15 (1970) and commentary to Rule 801 (d)(1):

> "The Rule, however, is not addressed to the question of the sufficiency of the evidence to send a case to the jury, but merely to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate. "

In this case, given the circumstances in which the prior testimony was obtained (Point IV); the witness's statements prior to his grand jury appearance consistent with his trial testimony that no threats were made, and the

likelihood that under the trial court's instructions (Point III), the jury credited the out of court statements by the process of reasoning disallowed under Dyer v McDougall, supra, Moorev Chesapeake R.R., 340 U.S.573,576 (1951), and Nishiwaka v Dulles, 356 U.S. 129,137 (1958) *, the Court should hold that the evidence as to Levine was insufficient on due process grounds.

(c) The proof was insufficient to establish the conspiracy count.

The gist of the conspiracy charged in count 1 was a combination to collect extensions of credit by extortionate means. The proof only established that appellant and co-defendant DeVito conspired to make and collect usurious loans, and not that they conspired to use extortionate means to collect them.

Neither man was ever present when the other (or Louis) engaged in the conduct allegedly constituting the extortionate means. In fact, they apparently never made collections together. There was no proof that either man had knowledge of the other's conduct. Without proof that an alleged conspirator was aware that his alleged co-conspirator was engaging in the criminal conduct prohibited by Section 894,

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*which reversed for insufficiency of evidence in a deportation proceeding because "disbelief of petitioner's story of his motives and fears (cannot) fill the evidentiary gap in the government's case. "

there is no proof of acting in concert with intent to accomplish the prohibited criminal goal. Cf. Vachon v New Hempshire, supra.

Nor can the gap in the proof be filled by inferring the existence of the conspiracy from proof of five equivocal substantive acts in a five year period of time--especially where the government's own witnesses testified that it was not the practice of either defendant to collect by force or threats of force. In short, this is not the kind of case where, in the absence of actual knowledge, the pattern of criminal conduct which unfolded at trial could lead a rational mind to conclude beyond a reasonable doubt that the defendants had conspired to violate federal law, rather than merely to obtain usurious interest on debts.

(d) In the absence of a Pinkerton or aiding and abetting charge, the proof was insufficient to attribute the acts of the co-defendant or Louis to appellant.

The trial court gave no Pinkerton charge and refused to charge aiding and abetting. (A.554) When a theory of guilt is not given in a charge, it is not available to sustain the verdict on appeal. Nye & Nissen v U.S., 336 U.S. 613, 618 (1949); U.S. v Hernandez, 290 F.2d 86, 90 (2 Cir. 1961) Appellant's conviction on counts 4 and 7, involving proof of actions by Louis and the co-defendant can be sustained only if the proof was sufficient to convict him

as a principal.

As in Vachon v New Hampshire, supra, there is no proof that appellant personally performed the criminal acts, or even that he was aware of the acts or had authorized them or was present where they occurred. The statute involved in Vachon, like Section 894, makes criminal knowing participation in a prohibited act. The record in this case, as in Vachon, is devoid of any proof of willing participation by appellant on the two counts involving actions of persons other than himself. As in Vachon, the conviction on those counts must be reversed on due process grounds.

(e) The conviction was predicated upon substituting disbelief of the government witnesses for affirmative proof

This record is replete with affirmative testimony by virtually every witness that appellant ever threatened or hurt them, that they were never afraid of appellant, that they and appellant were friendly and ate and played cards together, that they were not extortion victims, that the loan agreements were not forced on them, that they had never seen or heard appellant use force or threaten of force to collect from other debtors.

Cassese's testimony in particular--both before the grand jury and at trial--contains continued denials that the conduct constituting the only proof on count 7* was done to collect a debt; and continual affirmations that it occurred

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*on which appellant received a consecutive sentence

because he was personally offensive to the co-defendant. He said at the grand jury, and reiterated at trial, that he would not have borrowed if he believed his loansharks collected debts by threats of violence.

In order to find beyond a reasonable doubt that a conspiracy between appellant and Devito existed to use threats of force to collect debts or that appellant used extortionate means to collect debts in the instances charged, the jury would have to disbelieve virtually every government witness on the issue of threats and fear, and use that disbelief to fill the evidentiary gap in the government's case. This is precisely what Dyer v Mac Dougall, Nishiwaka v Dulles, Moore v Chesapeake, supra, and a legion of other cases including U.S. v Delutro, supra, hold cannot be done.

In DeLutro, supra, 435 F.2d at 256, the Court held that there were more ways to prove the existence of threats and fear than by the testimony of the victim. But it also specifically cautioned:

> "However, this does not relieve the government of the necessity of proving its case. Obviously, it still must present legally admissible evidence that the prohibited threats were made." (Ibid.)

In this case the government did not come forward with other proof, legally admissible or otherwise, to establish the existence of threats and fear in the face of the denials

it received from its own witnesses on the dispositive element of its case. Instead, in "a case made up of "ifs" and 'might have been's', " (U.S. v Rappaport, 312 F2d 502,505 (2 Cir.,1963), the government asked the jury to disregard the gaps in its proof and to assume--without foundation in the record--that the lack of proof was attributable to fear of the defendants. (Point II, infra)

The Supreme Court was reversed in a civil case where such a result occurred (Nishiwaka v Dulles, supra), and reversal must be ordered here.

POINT II

THE PROSECUTOR IMPROPERLY ARGUED FACTS NOT IN EVIDENCE IN SUMMATION, OVER OBJECTION. THE ERROR CANNOT BE DISREGARDED AS HARMLESS IN THE CIRCUMSTANCES OF THIS CASE.

The "fundamental rule, known to every lawyer, (is) that argument is limited to the facts in evidence." U.S. v Fearns, 501 7.2d 480,489 (5 Cir. 1974) In this case, as in Fearns, the prosecutor "conveyed an aura of superior knowledge available to the government...by blunt assertion of a fact that was not in evidence," when he asked the jury to find--without foundation in the record--that his witnesses denied threats and fear because they were in fear of the defendants. (supra pp 22-24). Nor can this argument be sustained as fair comment. For, as the Court stated in U.S. v Rappaport, supra, 312 F.2d at 504:

> "It is all very well to tell the jury that they are not bound by what counsel or the court may say and that it is this recollection of the evidence that counts, but inferences cannot be built upon non-existent evidence." (emphasis added)

The prosecutor also told the jury they had heard only some of the evidence available because the witnesses were afraid to testify at trial. (supra, p.23) This remark was an assertion "that the government is aware of evidence, beyond that introduced at trial, implicating (the appellant). Such a suggestion is clearly improper." U.S. v Somers, 496 F.2d 723, 740 (3 Cir. (1974); Kitchell v U.S., 354 F.2d 715, 719 (1 Cir. 1966) ("Remarks on the availability of unused 'evidence' are clearly impermissible.")

Where the prosecutor's argument "might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury on which the prosecutor was convinced of the accused's guilt", then those remarks alone justify reversal. Mc Millan v U.S., 363 F.2d 165, 169 (5 Cir. 1966)

Under the Court's holding in Dyer v Mac Dougall, supra, the government cannot establish its case by calling witnesses who deny the existence of the operative facts upon which guilt rests, and then invite the jury to disregard its witnesses denials on account of their demeanor and use such disbelief alone to support a finding that the opposite was true. A fortiori, the prosecutor cannot be permitted to argue that the jury, by considering the "aspect" of his witnesses, can disregard their denials of threats and fear and assume that they heard only "some of the admissions they were willing to make on the stand and in the grand jury".

This was an insufficient case to take to the jury or even to take to the grand jury, because the evidence established the appellant did not habitually collect by extortionate means; was not known to the "victims" to do so; and because the "victims" of the few isolated instances of burly conduct the government could muster to prove the contrary denied being put in fear or threatened. It would be a gross miscarriage of justice to hold on evidence such as this, that the prosecutor's improper arguments in summation designed to

fill the gaps in his otherwise insufficient proof, properly objected to below, were anything other than prejudicial errors requiring reversal of the conviction.

POINT III

THE TRIAL COURT'S CHARGE ON THREATS AND FEAR, OBJECTED TO BELOW, WAS ERRONEOUS AND CANNOT BE DISREGARDED AS HARMLESS ERROR.

The trial court's instruction, over objection, that the jury was to consider whether

> "the testimony of certain debtor witnesses denying that they were threatened...is influenced by fear of the defendants". (A.530)

was erroneous because, even if a correct statement of abstract law, it was directed to matters outside the evidence. II Wright, Federal Practice and Procedure, Sec. 485, p. 292; U.S. v Torrence, 480 F.2d 564, 565 (5 Cir. 1973); U.S. v Martin, 507 F.2d 458, 430-31 (7 Cir. 1974); Michaud v U.S., 350 F.2d 131, 133 (10 Cir. 1965); Morris v U.S., 336 F.2d 192, 195 (9 Cir. 1963)

The debtor witnesses denying that they were threatened were Cassese and Levine. Neither man had admitted (or had been asked) whether his denial of threats was made out of fear of the defendants, and no other proof of fear on the part of these witnesses was offered. Yet from the trial court's instructions, the jurors, who "were entitled to assume that they were not given irrelevant instructions" (Martin, supra) could have concluded that Levine's and Cassese's denials of the gist of the crime could be disregarded on a ground "nowhere evidenced in the record." (Torrence, supra)

> "When a false issue of magnitude sufficient to nullify proper consideration of the issues is inserted in a case, the proper administration of justice is thwarted and a conviction so based cannot stand." (Michaud v U.S., supra)

Since it is "error to instruct the jury based on a conjectual state of facts for which there is no evidence", and there was no evidence that the testimony of the witnesses denying they were threatened was influenced by fear of the defendants, the conviction must be reversed. Morris v U.S., supra, 326 F.2d at 195.

The trial court also charged, over objection:

> "I also instruct you that the testimony of a witness that he was not threatened, even if believed by you, is not conclusive or binding upon you." (A.530) (emphasis added)

This instruction is exactly the contrary of that held proper in U.S. v DeLutro, supra, 435 F.2d at 257, where the Court states:

> "Naturally, the testimony of (the victim) at trial that he was not threatened detracted from the government's case. Indeed, the trial judge properly charged the jury that if it believed that testimony, it should acquit." (emphasis added)

Whether or not the appellant made threats of physical harm in order to collect debts, as alleged, was the salient issue in the case. If the jurors believed the witnesses' testimony that no such threats were made, then a verdict of acquittal was proper. It is only in a case like DeLutro, supra, where the jury has a basis to disbelieve the victim's

denial of threats and where other legally admissible evidence to prove those threats is adduced, that a guilty verdict can be returned despite the victim's denial.

The erroneous instruction, properly objected to below, went to the heart of the fact findings process, and cannot be disregarded as harmless error.

The combined effect of the court's instructions--that the jury could consider whether the testimony by the government witnesses favorable to the appellant was caused by fear, without proof of fear in the record; that their denial of threats, even if believed, was not conclusive; and that the credibility of the witnesses' denials of fear must also be weighted--was to invite the jury to find guilt by the process of disbelieving the witnesses' testimony on threats and fears in order to fill the evidentiary gaps in the government's case. Nishiwaka v Dulles, supra, In the context of this case, the prejudice inherent in those instructions cannot be disregarded as harmless error.

The erroneous instructions, singly and in combination, warrant reversal on the facts of this case.

POINT IV

THE CONVICTION MUST BE REVERSED AS IT WAS SECURED THROUGH SUBSTANTIVE USE OF GRAND JURY TESTIMONY WHICH DID NOT FULLY & ACCURATELY REFLECT THE WITNESSES' DEALINGS WITH THE APPELLANT, BECAUSE OF GOVERNMENT PRESSURE UPON ONE WITNESS TO

RECOUNT A THREAT WHICH HAD NOT BEEN MADE, & WHERE GOVERNMENT OBJECTION PREVENTED ANOTHER WITNESS FROM TESTIFYING WHETHER THE ASSISTANT PRESENTING TO THE GRAND JURY HAD WITHHELD EVIDENCE WHICH HE KNEW WOULD TEND TO NEGATE GUILT.

Rule 801 (d) (1), Federal Rules of Evidence, adopting the De Sisto, (329 F.2d 929 (2 Cir. 1963) rationale, rejects the orthodox rule* that prior inconsistent statements, even if sworn, are not substantive evidence. De Sisto permitted use of sworn grand jury testimony believing it reliable because taken "in a setting calculated to impress the witness with the gravity of the responsibilities assumed." (329 F.2d at 934)

In order for the grand jury setting to produce this result, it would seem fundamental that the prosecutor presenting the case must have done so consistent with his "basic duty...to seek a just result," (ABA Standards, The Prosecution Function, Sec. 3.6 p.89), and with due regard to this Court's admonition that "...the grand jury is not meant to be the private tool of the prosecutor." U.S. v Fisher, 455 F.2d 1101, 1105 (2 Cir. 1972)

No case has yet considered whether a conviction can be predicated on Rule 801 (d) (1) testimony where government witnesses testify--without contradiction or impeachment by the government--that their grand jury testimony was materially inaccurate and incomplete because the assistant presenting to

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* IIIA Wigmore, Evidence, Sec. 1018, p 996.

the grand jury either withheld "evidence which he knows will tend to negate guilt" (ABA Standards, supra, Sec. 3.6 (b), or pressured a witness to give inaccurate grand jury testimony.

We submit that where the uncontradicted evidence establishes that the prosecutor's fundamental obligations in the grand jury were breached, this Court must exercise the power it possesses "to curtail any abuse of grand jury process by the prosecutor." (U.S. v Kleen Laundry & Cleaners, 381 F. Supp. 519, 523 (E.D.N.Y. 1974) by--at a minimum--holding that a conviction resulting from use of such evidence cannot stand, either on a due process basis or in the exercise of the court's supervisory power. c.f. U.S. v Basurto, 497 F.2d 781 (9 Cir. 1974); U.S. v Jacobs, F.2d - (2 Cir. 2-24-76) slip opin. 2111, 2115-18; U.S. v Gallo, 394 F. Supp. 310 (D. Conn. 1975)

In this case Ronald Levine testified--without impeachment--that his grand jury testimony recited a threat appellant had never uttered. Before called as a prosecution witness, he told the special assistant that his grand jury testimony was not accurate as it had been pressured from him by the assistant presenting it to the grand jury. He had testified to fear in the grand jury despite his repeated assertions before and during trial that he was never afraid of appellant, only because he wanted no trouble from the special assistant who gave him a choice between playing "our type of game and (going) along with what we say", or being a "hostile

witness". (supra, p.13)

Philip Cassese's entire grand jury testimony came in, over defense objection, despite his uncontradicted trial testimony that before appearing in the grand jury, he told the special assistant he was not a victim of extortion by appellant and without him being able to disclose--because of government objection--whether the special assistant questioned him in the grand jury about information known by the prosecutor to be favorable to the appellant.

This testimony was never challenged as untrue by the government. Compare U.S. v Rivera, 513 F.2d 519 (2 Cir. 1975) and U.S. v Jordano, 521 F.2d 695 (2 Cir. 1975), where, when witnesses claimed perjury in the grand jury because of coercion, from the police or FBI, the government rebutted the alleged coercion by calling the officer involved to deny the threats and by proving the witness' recantation was due to fear of reprisal. Nothing of the sort was done in this case--in fact, the government never even cross-examined the witnesses in an attempt to impeach this testimony of improper governmental pressure. Moreover, in Rivera and Jordano, supra, there was ample evidence aside from the prior grand jury testimony to sustain the verdicts. In this case, without Levine's grand jury testimony the government had no case on count 2, (Point I, supra) and since the jury specifically called for Levine's grand jury testimony during deliberation, over defense objection, and mistrial motion, and were permitted to hear it with the explanation excised, it must be assumed the

testimony had substantial effect upon the entire verdict.

We submit that Rule 801 (d) (1) cannot apply to sustain a verdict where the grand jury testimony admitted pursuant to it was secured in violation of the prosecutor's duty under ABA Standards Sec. 3.6 (b), supra, to present evidence which he knows will tend to negate guilt; to "observe some limits of essential fairness in (his) work with investigative bodies", (U.S. v Sweig, 316 F. Supp. 1148, 1153 (S.D.N.Y. 1970); and to fulfill "his responsibility to deal with the grand jury in a way that promotes the wise exercise of its investigatory and indictment powers". U.S. v Basurto, supra, 497 F.2d at 794 (concurring opinion).

In Basurto and Gallo, supra, where the prosecutors knew before trial that witnesses had perjured themselves in the grand jury, the courts held the prosecutors under a duty to notify the court, opposing counsel and the grand jury itself, in order that appropriate corrective actions could be taken. U.S. v Basurto, 497 F.2d at 786, 793; U.S. v Gallo, 394 F. Supp at 315. As this was not done, the indictments were dismissed, despite the fact that there was other evidence to sustain the charges. In this case, where the prosecutor also had been informed prior to trial of the incompleteness and inaccuracy of the grand jury testimony, but used it anyway, the court should reverse the conviction and dismiss the indictment not only to "preserve the functions of the grand jury as an effective safeguard against oppressive actions of the prosecutor"

(U.S. v Gallo, supra, 394 F. Supp at 313-14), but also to insure the integrity of sworn grand jury testimony used substantively at trial under Rule 801 (d) (1).

POINT V

IF THE EVIDENCE IS LEGALLY SUFFICIENT TO SUSTAIN THE VERDICT, THE STATUTE AS APPLIED IN THIS CASE IS UNCONSTITUTIONAL.

In his dissenting opinion in U.S. v Perez, 426 F.2d 1973, 1082 (2 Cir. 1970), aff'd 402 U.S. 146 (1970), Judge Hays warned of the danger of making "every trivial, insignificant and purely local act" of the kind condemned under the extortionate credit act a federal crime without regard to whether it had "any significant effect on interstate commerce."

If it had been clear when the Supreme Court rejected such attack on the constitutionality of the statute, that it would be used to make a federal crime out of the kind of conduct proved in this case, the result could not have been the same.

Under the language of the statute as applied in this case, any vulgarism which contains a literal threat to a part of the body used in connection with the collection of money owed is a federal crime without regard to whether it actually produces fear in the debtor. Any altercation by grown men over money owed where the creditor touches the debtor constitutes the use of force to collect the debt, whether it hurt or didn't or whether or not it put the debtor in fear.

Any loan in violation of state usury laws can be deemed collected by extortionate means unless an "Alfonse-Gaston" type of collection practice is employed.

If the evidence is deemed sufficient to sustain the conviction in this case, then counsel's objection to the constitutionality of the statute (A.431) was well taken and it must be held unconstitutional because its application in this case renders it void for vagueness (c.f. Cox v Louisianna, 379 U.S. 536 and 559 (1965); Shuttlesworth v Birmingham, 382 U.S. 87 (1965)) and extends its ambit to purely local acts beyond the powers of the congress to control. (c.f. Keller v U.S., 213 U.S. 138, 148 (1909))

POINT VI

PURSUANT TO RULE 28 (i) F.R.A.P., APPELLANT ADOPTS THE ARGUMENTS OF OTHER COUNSEL APPLICABLE TO HIM.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED. ALTERNATIVELY, SECTION 894 MUST BE DECLARED UNCONSTITUTIONAL AS APPLIED IN THIS CASE, & THE INDICTMENT DISMISSED ON THIS BASIS.

Respectfully submitted,

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